NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re:	:	
	:	
LORRAINE MOCCO, et al.,	:	
	:	Bankruptcy No. 94-31931 (WHG)
Debtor.	:	
	:	
CITY OF JERSEY CITY,	:	
	:	CIVIL ACTION NO. 02-254 (MLC)
Appellant,	:	
	:	
v.	:	**MEMORANDUM AND ORDER**
	:	
PETER MOCCO and VILLAGE TOWNHOUSE ESTATES, INC.,	:	FILED: September 30, 2002
	:	
Appellee,	:	
	:	

COOPER, District Judge

APPEARANCES :

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This matter comes before the Court on appeal of the Order of the United States Bankruptcy Court for the District of New Jersey dated December 19, 2001, reducing the assessed taxes for tax

years 1986 and 1988-1996 on debtors' real property. We have jurisdiction pursuant to 28 U.S.C. § 158(a). For the reasons stated herein, the Order of the bankruptcy court is affirmed.

BACKGROUND

Debtor-appellee Peter Mocco ("Mocco")[1] entered into a "Contract for the Sale of Land for Private Development" ("Redevelopment Agreement") with the Jersey City Redevelopment Agency ("JCRA") to acquire and redevelop the property in dispute ("subject property") on February 14, 1985. (R., Item 1; R., Item 8, Ex. A.) Mocco v. City of Jersey City, 222 B.R. 440 (Bankr. D.N.J. 1998). The subject property is a seventy-five acre parcel located in the Liberty Harbor North Redevelopment Zone ("Redevelopment Zone") in the City of Jersey City ("City"), which had previously been an industrial area. Id. at 446. In 1973, the City formulated the Liberty Harbor North Redevelopment Plan ("Redevelopment Plan") to "promote residential development and other improvements to the industrialized downtown area." Id. at 446.

In accordance with the Redevelopment Agreement, the City would assist Mocco in buying the subject property from the Employees Retirement System of Jersey City ("ERS"), which had

[1] Village Townhouse Estates, Inc. is also a debtor-appellee in this appeal; however, the bankruptcy court found that, "it is not a significant party in this decision as trial went forward only on those parcels relating to Peter Mocco." 222 B.R. at 445.

owned it since 1983. Id. In addition, the Redevelopment Agreement provided that Mocco would be designated as the redeveloper of the Redevelopment Zone, that Mocco would have exclusive rights to acquire lots adjacent to the subject property "to provide access to the adjoining streets," and that the JCRA would, if necessary, "use its powers of eminent domain" to assist him in acquiring those abutting parcels. Id. at 446-47.

After Mocco entered into the Redevelopment Agreement with the JCRA and purchased the subject property from ERS, Mocco encountered several impediments to redevelopment. In accordance with the Redevelopment Agreement, the JCRA endeavored to condemn properties abutting the subject property. Under New Jersey law, the City must first declare that an area is blighted before it can condemn property. N.J.S.A. § 1:1-26; N.J. Const. Art. 8, § 3 ¶ 1. The JCRA's declaration of blight as to two parcels, known as "the triangle area," however, was defective. 222 B.R. at 447. The triangle area encompassed Liberty Harbor Drive, a street which was to be constructed to provide necessary ingress and egress onto the subject property. Id. at 448.

Three decisions negatively affecting Mocco's property interest resulted from the defective declaration of blight: (1) the Jersey City Planning Board ("Planning Board") denied applications for approval of both Mocco's site plan and subdivision plan for the redevelopment project, (R., Item 8, Ex.

B); (2) the Jersey City Municipal Council ("Municipal Council") issued a resolution on November 10, 1988, finding that the blight was defective and the condemnation, therefore, illegal and directing the City to revest title in wrongfully condemned properties to their prior owners, (R., Item 8, Ex. D); and (3) the New Jersey Superior Court, per Judge Burrell Ives Humphreys ("Judge Humphreys"), affirmed the Municipal Council's decision. (R., Item 7, Ex. D.) 222 B.R. at 447. Although the JCRA returned property to some original owners upon request, it never informed all owners of the illegal condemnation. Id. at 447-48. Thus, the bankruptcy court found that the possibility of other original owners reclaiming their property cast a cloud upon the development of the subject property. Id.

The parties had also intended two other roads, Jersey Avenue and Luis Munoz Marin Boulevard ("Marin Boulevard"), to provide ancillary ingress and egress onto the property. However, the bankruptcy court found that several impediments prevented practical access from these roads, as well. Id. at 448-49, 462-64.

Finally, the subject property was environmentally contaminated, because illegal dumping had historically occurred there. Id. at 450-51. To successfully develop the property, Mocco would have had to spend between fifteen and twenty million dollars on environmental remediation. Id. at 466.

Based on these impediments, Mocco filed appeals with the Tax Court of New Jersey ("tax court") for the years 1986 and 1988-1994, arguing that the City's valuations of the subject property materially overstated its full and fair market value. (Br. of Appellees on Appeal from the Final J. of the Bankr. Ct. in Adversarial Proceeding No. 94-3333 ("Mocco's Br.") at 3; Br. of the City of Jersey City on Appeal from Final J. of the Bankr. Ct. in Adversary Proceeding No. 94-3333 ("City's Br.") at 7-8.) On November 14, 1991, the tax court dismissed Mocco's appeals for tax years 1988, 1989, and 1990 for failure to prosecute. (City's Br. at 7; R. Item 13, Exs. C, D, & E.) Three years later, however, on July 12, 1994, Tax Court Judge Joseph C. Small ("Judge Small") sent a letter notifying the parties, inter alia, that Mocco's 1988-1994 appeals were *all* pending in the tax court. (Appendix of Appellees Peter Mocco and Village Townhouse Estates, Inc. ("Mocco's Appendix"), Ex. 2.) On June 29, 1994, however, Mocco had already filed notice to remove from tax court to bankruptcy court all tax appeals then pending for the years 1986-1994 pursuant to § 505(a)(2) of the Bankruptcy Code. (Mocco's Appendix, Ex. 1.)

The parties later stipulated to the exclusive jurisdiction of the bankruptcy court for the pending 1986-1994 tax appeals. (Mocco's Appendix, Exs. 4 & 5.) On September 29, 1995, the tax court accordingly dismissed all tax appeals for 1986-1993 without

prejudice, thus dismissing the 1988-1990 appeals for a second time. (Mocco's Appendix, Ex. 6.) Thereafter, the parties entered further stipulations and the tax court entered further orders of dismissal, removing plaintiff's pending 1994 and 1995 tax appeals from tax court to bankruptcy court, as well. (See Mocco's Appendix, Exs. 7-9.)

The bankruptcy court held plenary hearings before Judge William H. Gindin ("Judge Gindin") on May 23, 1996, July 2, 1996, and September 11, 1996, and issued its opinion on July 1, 1998. (R., Item 1.) Mocco v. City of Jersey City, 222 B.R. 440 (Bankr. D.N.J. 1998). In accordance with this opinion, Judge Gindin signed a judgment on July 30, 1998, reducing the valuation of the subject property for real property tax purposes for tax years 1986-1995. (R., Item 3.) On July 11, 2000, Judge Gindin signed a second judgment reducing the valuation for tax year 1996 and directing the parties to submit an additional order allocating reductions and assessments on a tax lot basis. (See 12-19-01 Order.) The City then made a motion to reconsider the prior opinions and judgments of the court, arguing that the bankruptcy court did not have jurisdiction in light of In re Custom Distrib. Serv.'s ("Custom"), 224 F.3d 235 (3d Cir. 2000). United States Bankruptcy Judge Raymond T. Lyons ("Judge Lyons") dismissed the city's motion to reconsider and entered a final judgment on December 19, 2001, making reductions in accordance with the

parties' written submissions pursuant to Judge Gindin's Order of July 11, 2000. (12-19-01 Order.)

Meanwhile, a collateral proceeding was held on January 27, 1997 in this Court ("collateral district court proceeding"), before Judge Garrett E. Brown ("Judge Brown") addressing Mocco's breach of contract claims and the City's counterclaims. On June 24, 1998, Judge Brown entered a judgment granting both parties' claims for breach of contract, but finding that the breaches did not preclude development of the subject property. (R., Item 7, Ex. B.)

The City appeals from Judge Lyon's Order of December 19, 2001, arguing: (1) the bankruptcy court did not have jurisdiction to consider Mocco's tax appeals; (2) the bankruptcy court's findings regarding the highest and best use of the subject property were clearly erroneous; (3) the bankruptcy court should have applied the doctrine of judicial estoppel; and (4) the bankruptcy court should have applied the doctrine of collateral estoppel.

STANDARD OF REVIEW

This Court must accept the bankruptcy court's findings of fact unless those findings are clearly erroneous. In re Reid, 757 F.2d 230, 233 (10th Cir. 1985). To the extent that a question presented is one of law, we must exercise plenary review. See In re Sharon Steel Corp., 871 F.2d 1217, 1222-23 (3d

Cir. 1989). Where there are mixed questions of law and fact, this Court must break down these questions and apply the appropriate standard to each component. Id.

DISCUSSION

I. Jurisdiction

The bankruptcy court has authority to adjudicate tax assessments of real property pursuant to 11 U.S.C. § 505(a), which provides:

> (a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine, or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.
> (2)The court may not so determine--
> (A)the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or
> (B) any right of the estate to a tax refund before the earlier of--
> (i)120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or
> (ii) a determination by such governmental unit of such request.

This section affords the bankruptcy court broad discretionary power to determine the amount of any tax, provided the tax does not fall under one of the exceptions in sections 505(a)(2)(A) or 505(a)(2)(B). See In re A.W.B. Assocs., 144 B.R. 270, 278

(Bankr. E.D. Pa. 1992) (citing In re Century Vault Co., 416 F.2d 1035, 1040-41 (3d Cir. 1969) (court applied section 505 for purpose of challenging several years of prepetition real estate tax assessments); In re Piper Aircraft Corp., 171 B.R. 415 (Bankr. S.D. Fla. 1994); In re Penking Trust, 196 B.R. 389 (Bankr. E.D. Tenn. 1996). The City argues, however, that Mocco's tax appeals fall under both of the exceptions to jurisdiction in section 505, because (1) the amount or legality of the disputed taxes were already adjudicated by the tax court pursuant to section 505(a)(2)(A), and (2) Mocco did not "properly" request a refund from the City before removing his claims to bankruptcy court pursuant to 505(a)(2)(B). We disagree with both contentions, and thus find that the bankruptcy court had jurisdiction to consider Mocco's tax appeals.

A. Section 505(a)(2)(A)

In accordance with section 505(a)(2)(A), a bankruptcy court does not have jurisdiction over a tax appeal previously adjudicated by a judicial tribunal of competent jurisdiction. 11 U.S.C. § 505(a)(2)(A). Citing a decision from the United States Bankruptcy Court for the District of Minnesota, the City argues that the tax court's dismissal of Mocco's 1988-1990 tax appeals for failure to prosecute amounted to an adjudication precluding bankruptcy court review. (City's Br. at 7, 15; R., Item 13, Exs. C, D, & E.) In re Northbrook Partners LLP ("Northbrook"), 245

B.R. 104 (Bankr. D. Minn. 2000). Northbrook held that a dismissal for failure to make timely partial payment amounted to an adjudication within the meaning of section 505(a)(2)(A). Id. In making this determination, the Minnesota bankruptcy court analogized the dismissal to a default judgment, which has preclusive effect in that state. Id. In New Jersey, however, a default judgment does not necessarily have preclusive effect. See Turner v. Accountants on Call, 892 F. Supp. 645, 646 (D.N.J. 1995) (holding that a default judgment does not necessarily have preclusive effect, because the New Jersey Supreme Court has stated that "the 'ultimate sanction of dismissal' should be used 'only sparingly' where no other sanction would suffice") (quoting Abtrax Pharm. v. Elkins-Sinn, Inc., 139 N.J. 499, 655 A.2d 1368 (1995); see also Housing Auth. of Morristown v. Little, 135 N.J. 274, 283, 639 A.2d 286 (1994) (a motion to vacate a default judgment is "viewed with great liberality"); Allen v. Heritage Assoc., 325 N.J. Super. 112, 119, 737 A.2d 1158, 1161 (Sup. Ct. App. Div. 1999). Thus, the same analogy does not apply here.

In any event, despite the dismissals of Mocco's 1988-1990 tax appeals for failure to prosecute in 1991, the tax court recognized that these tax appeals were still pending in 1994, (Mocco's Appendix, Ex. 2) and dismissed the same appeals again in 1995. (Mocco's Appendix, Exs. 6 & 7.) A tax court, under certain circumstances, has the power to reinstate a petitioner's

appeal following dismissal for failure to follow proper procedures. See., e.g. Northbrook, 245 B.R. at 113. Northbrook itself recognized that possibility when it found that the tax court provided its own procedures for relief from dismissal. Id. (citing Husby-Thompson Co. v. City of Freeborn, 435 N.W.2d 814, 815 (Minn. 1989) (holding that relief from dismissal may be granted in cases of "mistake, inadvertence, surprise, or excusable neglect")); see also SAIJ Realty, Inc. v. Upper Deerfield Township, 5 N.J. Tax 292 (N.J. Tax Ct. 1983) (reversing decision of County Board of Taxation refusing to set aside its dismissal for lack of prosecution). Thus, we find that the tax court's (1) recognition in 1994 that the 1988-1990 appeals were still pending, and (2) dismissals of these appeals without prejudice in 1995, indicate that these appeals had been reinstated sometime after their initial dismissal in 1991.[2]

The City concedes that the 1991-1995 appeals were not dismissed until after Mocco's removal to bankruptcy court. Thus, none of the tax appeals in question had been adjudicated prior to removal to bankruptcy court, and section 505(a)(2)(A) did not bar

[2] The City argues that we should not consider its stipulations to jurisdiction, because jurisdiction is not waivable and may be raised at any time, including on appeal. Weaver v. Bowers, 657 F.2d 1356, 1360 (3d Cir. 1981). We agree; however, our finding that the appeals were not adjudicated is compelled not by the parties' stipulations, but by the tax court's acknowledgments that the appeals were still pending. As such, the City's argument is not relevant to our decision.

jurisdiction.

B. Section 505(a)(2)(B)

In accordance with section 505(a)(2)(B), a bankruptcy court does not have jurisdiction to order a tax refund until 120 days after the taxpayer properly requests a refund from the governmental unit from which it is claimed. 11 U.S.C. § 505(a)(2)(B)(i).[3] The City argues that Mocco did not properly file his claims for refunds with the taxing authorities for the years in question, and therefore the bankruptcy court did not have jurisdiction. We disagree.

The Third Circuit has recently held that the language "properly requests" in section 505(a)(2)(B)(i) requires a debtor seeking a tax refund to comply with the procedural requirements and time limitations set forth by the taxing authority before the bankruptcy court can exercise jurisdiction. Custom, 224 F.3d at 242. In that case the debtor, Custom, sought reductions in his tax assessments for the 1992-1997 tax years. Id. at 239. Custom had filed a tax appeal with the tax court for only one of the years in question, and that appeal was dismissed at Custom's

[3] There is some dispute as to whether Mocco's claim here is in the nature of a refund or an offset, the former requiring debtors to first file a tax appeal and the latter only requiring debtors to seek their offset in bankruptcy court within the time allowed to file a tax appeal. Custom, 224 F.3d at 245. Because we find that plaintiff has filed proper appeals for all tax years in question, we need not address this issue.

request. Id. at 238. Thus, the Third Circuit held that the bankruptcy court did not have jurisdiction, because Custom did not "seasonably [seek] an appeal with the appropriate tax assessing entity" in accordance with New Jersey law. Id. at 241, 243-44 (citing N.J.S.A. § 54:3-21). The court in Custom based its holding at least partially on the negative policy implications of allowing a debtor to claim tax refunds from a municipality for taxes paid in previous years. 224 F.3d at 243.

The City concedes that Mocco filed timely appeals with the tax court for years 1986 and 1988-1994.[4] (City's Br. at 14 n.3; R., Item 13 ¶¶ 3-16, R., Item 12 ¶ 3.) However, the City argues that Mocco did not properly file his appeals because he failed to prosecute. (City's Br. at 14.) Mocco followed the demands of New Jersey law when he filed appeals with the county board of taxation by August 15 of each year for which he claimed a tax refund. N.J.S.A. § 54:3-21. The City cites several cases for the proposition that a debtor must file for tax refunds according to state procedures before the bankruptcy court may assume jurisdiction. In each of these cases, however, the debtors failed to file either timely appeals or jurisdictionally proper appeals. In re Constable Terminal, Inc., 222 B.R. 734, 735

[4] Although the parties agree that no tax appeal was filed in 1987, the bankruptcy court actually increased, not reduced the assessment for that year. (Recording of Oral Argument dated 5-15-02.) Thus, the City's appeal does not relate to that year, and we need not address it.

(Bankr. D.N.J. 1998) (debtor never filed requests for refund with tax board or court); In re Millsaps, 133 B.R. 547, 553 (Bankr. M.D. Fl. 1991) (same); In re St. John's Nursing Home, Inc., 154 B.R. 117, 118 (Bankr. D. Mass. 1993), aff'd 169 B.R. 795 (D. Mass. 1990) (same); In re EUA Power Corp., 184 B.R. 631, 634 (Bankr. D.N.H. 1995) (debtor failed to file request within time permitted by law); In the Matter of Qual Krom South, Inc. 119 B.R. 327, 329 (Bankr. S.D. Fla. 1990) (same); In re Penking Trust d/b/a Kingsport Mall, 196 B.R. 389, 396 (debtor paid prepetition taxes without protest, thus barring his ability to properly request refunds). None of these cases address the situation where a debtor failed to properly prosecute. The language in section 505(a)(2)(B) requires the debtor to *properly request a refund*, not to *properly prosecute his pending appeal*. 11 U.S.C. § 505(a)(2)(B)(ii).

The City further argues that the present case involves the same policy implications addressed in Custom. (City's Br. at 12-13.) 224 F.3d at 243. We disagree, and instead find that affording the bankruptcy court jurisdiction in this matter furthers the overall policy behind section 505(a), while not hindering the purpose behind section 505(a)(2)(B). Section 505(a) is based in two general policies:

> It allows the prompt resolution of a debtor's tax liability, where that liability has not been determined prior to the bankruptcy proceeding, in the same forum addressing the debtor's overall financial condition and

> it protects creditors from the dissipation of the estate's assets which could result if the debtor failed to challenge a prepetition assessment.

Penking Trust, 196 B.R. at 393. Here, the policy of allowing a prompt resolution of Mocco's tax liability is promoted by consolidating all of the matters in bankruptcy court.

The purpose of section 505(a)(2)(B) is to "afford the taxing authority a reasonable opportunity to review any refund claim under its normal administrative procedures." Id. Here, the matter was not removed to bankruptcy court until more than 120 days after the appeals were first timely filed in tax court, in accordance with section 505(a)(2)(B)(ii). Thus, the tax court had adequate time to handle the appeals, either by dismissing them for failure to prosecute or handling them in any other way they saw fit. As the appeals were still pending when Mocco filed for removal, the bankruptcy court had jurisdiction. Moreover, by timely filing his request for tax refunds for the years in question, Mocco put the City on notice of his claims, preventing potential "financial instability" caused by refunding taxes paid in earlier years. Custom, 224 F.3d at 243. Thus, the policy considerations associated with section 505(a)(2)(B) are not at issue in the present case.

II. Judge Gindin's Findings

The City contends that Judge Gindin's findings leading to his assessment of the true value of the subject property for real

estate tax purposes in his July 1, 1998 opinion were clearly erroneous. We disagree.

The parties agreed on the "sales comparison approach" to value the subject property for real estate tax purposes. 222 B.R. at 457. In accordance with this method, the first step was to determine the "highest and best use of the property." Id. Under New Jersey law, highest and best use encompasses the following four characteristics: (1)legally permissible; (2) physically possible; (3) financially feasible; and (4) that which results in the highest value, i.e. most profitable. Schimpf v. Little Egg Harbor Township, 14 N.J. Tax 388 (N.J. Tax Ct. 1994).

The City argued before the bankruptcy court that an 1,880-unit condominium development was the highest and best use of the subject property. Id. at 458. Mocco, on the other hand, contended that the highest and best use was development for tax years 1986-1988, and holding property for future development for tax years 1988-1996. Id. Judge Gindin agreed with Mocco, finding that the City's proposed use was not legally permissible, physically possible, financially reasonable, or most profitable.

A. Legally Permissible

Judge Gindin found that use of the property as an 1,880-unit condominium development was not legally permissible, because the Planning Board twice denied Mocco's subdivision approval due to insufficient access. He further found that future subdivision

approval was speculative, because (1) the subject property did not have access to Liberty Harbor Drive, which was required by the Redevelopment Plan, and (2) the subject property was effectively landlocked, because of the insufficiency of alternative roads for access. For the following reasons, we find that Judge Gindin's determination on the issue of legal permissibility was not clearly erroneous.

1. *Finding of No Access from Liberty Harbor Drive*

In finding that Liberty Harbor Drive did not provide access to the subject property, Judge Gindin relied upon: (1) the Planning Board's two denials of Mocco's applications for approval of his subdivision plan, (222 B.R. at 447; R., Item 8 at 33), (2) the resolution of the Municipal Council that title to all properties in the illegally-condemned triangle area must be returned to their original owners, (222 B.R. at 447; R., Item 8, Ex. D), and (3) the affirmation of that resolution by the Superior Court per Judge Humphreys. (R., Item 7, Ex. D) In addition, the City's own expert testified at trial that the improper blight was directly beneath Liberty Harbor Drive. 222 B.R. at 448. Moreover, Gindin relied on the maps Mocco provided showing that the triangle area included Liberty Harbor Drive. (Mocco's Appendix, Ex. 12.)

The City argues that Liberty Harbor Drive provides adequate access, because Judge Humphreys's decision only required property

to be returned to the owners challenging the condemnation in the dispute before him, and that property was not under Liberty Harbor Drive. (City's Br. at 21-22.) Indeed, the Planning Board made a third party complaint on behalf of particular property owners within the triangle area. (R., Item 7, Ex. D.) The finding of improper blight, however, related to the entire triangle area, including the property beneath Liberty Harbor Drive. (Id.) Judge Humphreys further held that the City should proceed to properly blight the triangle area and that property owners would have the right to object to condemnation. (Id.) As the City presented no evidence at trial to demonstrate attempts it made to properly blight the area, Judge Gindin's determination that the City would likely have to return property to original owners of land under Liberty Harbor Drive was not clearly erroneous. 222 B.R. at 448.

We are not compelled by the City's assertion that "no former owner of any property located underneath the roadway had sought a return of that property." (City's Br. at 22.) This eventuality does not remove the cloud that existed on the property during the tax years in question. Nor are we persuaded by the City's argument that the JCRA had title insurance to the triangle area. (Id. at 38.) Such evidence is not conclusive, and Judge Gindin relied on sufficient alternative evidence to determine that the property was illegally blighted and condemned.

Further, in making these two arguments, the City relies on the written declaration of Executive Director of the JCRA Paul Hamilton ("Hamilton") dated October 7, 1998, rather than citing evidence before Judge Gindin. (City's Br. at 21, 38; R., Ex. 6, ¶ 4.) We cannot consider evidence outside the record on appeal. See, e.g. First Bank of Whiting v. Kham & Nate's Shoes, No. 2, Inc., 104 B.R. 909, 920 (N.D. Ill. 1989). Moreover, Judge Gindin afforded the City the opportunity to present this evidence at trial, and it failed to do so. 222 B.R. at 448. Thus, Judge Gindin's finding that the subject property did not have access from Liberty Harbor Drive is not clearly erroneous.[5]

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[5] The City contests other findings that relate to legal permissibility, but were not necessary to Judge Gindin's conclusion. First, the City argues that contrary to Judge Gindin's finding, the completion of construction of Liberty Harbor Drive was not the City's responsibility. (City's Br. at 23-24.) Whether or not this was the City's responsibility, the City does not dispute that construction was not, in fact, complete. We find, therefore, that Judge Gindin was not clearly erroneous in concluding that completion did not occur because of the illegal blight.

Second, the City contests Judge Gindin's findings that its conduct, including filing counterclaims and failing to take steps to cure the defective blight, demonstrated its intention not to go forward with the project. The City points out that it intended not to rescind the Redevelopment Agreement, but to terminate Mr. Mocco's status as redeveloper. (City's Br. at 27.) The City again cites only evidence that was not before Judge Gindin. (Id.) In any event, we find that Judge Gindin's conclusion was not clearly erroneous considering the City's failure to cure the defective blight, which it does not dispute.

Moreover, these issues are only two of the factors that Judge Gindin considered in determining that Liberty Harbor Drive did not provide adequate access, and thus development was legally impermissible. The finding of illegal blight and the Planning Board's denials of Mocco's requests for subdivision approval,

2. *Finding that the Property was Effectively Landlocked*

In addition to the problems with Liberty Harbor Drive, Judge Gindin found that the subject property was effectively landlocked, because Jersey Avenue and Marin Boulevard, which were intended to provide ancillary access, were also inadequate. Judge Gindin based this finding on the following evidence: (1) the roads were not yet dedicated as public roads by the City, 222 B.R. at 448; (2) the roads did not abut the subject property,[6] Id. at 449; (3) the City's expert conceded that these roads were not wide enough to accommodate access onto the subject property, Id.; (4) the roads pass through contaminated or aesthetically unpleasing property, Id.; (5) according to maps and testimony from Mocco's expert, access from Marin Boulevard would be circuitous, Id. at 463; and (6) both the Redevelopment Plan and the City Planning Board required main access to be from Grand Street, which abuts Liberty Harbor Drive, not Marin Boulevard or Jersey Avenue. Id. at 450, 463-64.

The City does not dispute any of this evidence. Rather, it merely states that, "alternative secondary access is available,"

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however, were alone sufficient to support his conclusion.

[6] The City argued that Mocco entered a contract to obtain property separating Marin Boulevard from the subject property. This contract, however, was over eleven years old. 222 B.R. at 449. Moreover, Judge Gindin found that the City did not present sufficient evidence demonstrating that this contract was capable of enforcement. Id.

and insists that Mr. Mocco would not have sought development if the property were landlocked. (City's Br. at 24-25.) Such unsupported statements are insufficient to overcome the City's burden of demonstrating that Judge Gindin's findings were clearly erroneous.

B. Physically Possible

Judge Gindin found that development was not physically possible for six reasons: (1) the subject property was landlocked; (2) the Redevelopment Plan required that the development consist of seventy-five acres, and during the tax years in question it only consisted of approximately forty-four acres; (3) the Redevelopment Plan required that the homes physically front Grand Street, and the property did not abut Grand Street; (4) the soil density was insufficient to support condominium development; (5) the property was contaminated with hazardous substances that would cost between fifteen and twenty million dollars to remove; and (6) roadways were not sufficiently wide to accommodate access. 222 B.R. at 464-65.

We have already found that Judge Gindin's conclusions that the subject property was landlocked and that roadways were not sufficiently wide to accommodate access were not clearly erroneous. In response to the acreage finding, the City argues that it intended to convey the remaining thirty-one acres to Mocco after he paid for it. (City's Br. at 31.) However, as

support the City relies upon the 1998 judgment from the collateral district court proceedings, evidence which was not presented at trial nor even existing at the time. (Id.; R., Item 7, Ex. B ¶¶ 4-5.) The City does not dispute that the property only consisted of approximately forty-four acres at the time of trial and during all of the tax years in question. Thus, we find that Judge Gindin's finding regarding the acreage of the parcel was not clearly erroneous.

The City further asserts that environmental contamination was not a problem, because Mr. Mocco stated that remediation would be possible within an approximately eight-month time frame. (City's Br. at 32; R., Item 8, Ex. A.) First, the statement the City refers to was an affidavit that was not presented before Judge Gindin at trial. Second, Judge Gindin specifically stated that he was not compelled by Mocco's opinion that environmental issues were not a problem. 222 B.R. at 451. Instead, he relied on expert appraisals and testimony, statements in the Redevelopment Agreement regarding indemnification, and the price of the subject property to conclude that the parties were bargaining for the sale of contaminated property. 222 B.R. at 450-51.

Moreover, the City only addresses Mocco's current plans regarding the property, not his ability to remediate during tax years 1986 and 1988-1996. "Where there are two permissible views

of the evidence, the fact finder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985); United States v. Pelullo, 173 F.3d 131, 135 (3d Cir. 1999), cert. denied, 528 U.S. 824 (1999). Thus, Judge Gindin was not clearly erroneous in determining that environmental remediation was not possible during the tax years in question.

In response to Judge Gindin's other findings regarding physical possibility, the City makes unsupported allegations that wetlands could be filled in and that the Redevelopment Plan could be modified to not require homes fronting on Grand Street. (City's Br. at 31-32.) As these eventualities are currently speculative, and were certainly speculative during the tax years in question, we find that Judge Gindin's determination that these factors made development physically impossible was not clearly erroneous either.

C. Financially Feasible

Judge Gindin found that use of the property as a condominium development was not financially feasible, because there was no

specific testimony as to how the project would be financed,[7] the costs of environmental remediation would be exorbitant, and the City's expert admitted that almost every other development in the surrounding area had undergone bankruptcy, foreclosure, or some other type of financial demise. 222 B.R. at 465-66.

The City points to Mr. Mocco's declaration after trial that development was feasible and that he had obtained financing. (City's Br. at 34; R., Item 7, Ex. A at 7.) However, the City again cites no evidence that was before Judge Gindin. In any event, Mocco's ability to develop the project in 1998 is not relevant to his ability during the tax years in question. Indeed, Mocco stated in the same declaration that he had been unable to proceed with development under the existing Redevelopment Agreement, because of the City's failure to cure the defective blight and comply with other obligations. (R., Item 7, Ex. A at 7-8.) Moreover, Mocco did not obtain financing until May 28, 1998, over a year after the last hearing before Judge Gindin. (Id.) Thus, we find that Judge Gindin's

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[7] The City is correct in its assertion that Mocco bore the burden of showing that the City's assessment was incorrect, and therefore that the City's proposed use was not the highest and best use of the property. Schimpf, 14 N.J. Tax. at 343. Judge Gindin, however, relied on Mocco's evidence that he could not finance the project, namely environmental factors and the circumstances of surrounding property owners. The City then bore the burden to rebut this evidence. See Ford Motor Co. v. Edison Township, 127 N.J. 290, 312, 604 A.2d 580 (1992). We find that Judge Gindin's finding that the City failed to do so was not clearly erroneous.

determination that development was not financially feasible during the tax years in question was not clearly erroneous.

D. Most Profitable

For the same reasons that development of the property was not financially feasible, Judge Gindin found that it was similarly not profitable during the tax years in question. 222 B.R. at 466-67. Because Judge Gindin's findings regarding financial feasibility were not clearly erroneous, we find the same regarding profitability.

III. Judicial Estoppel

The City argues that Mocco's claims are barred by the equitable doctrine of judicial estoppel, because he submitted an affidavit in the collateral district court proceedings indicating that he was capable of going forward with development. (City's Br. at 40.) We disagree.

Under the doctrine of judicial estoppel a party is barred from asserting a claim against a particular party in one proceeding and later asserting an inconsistent claim against the same party in a second proceeding. Scarano v. Cent. R.R. Co. of N.J., 203 F.2d 510, 513 (3d Cir. 1953); Oneida Motor Freight, Inc. v. Singleton, 848 F.2d 414 (3d Cir. 1988). "Such use of inconsistent positions would most flagrantly exemplify that playing fast and loose with the courts which has been emphasized as an evil the courts should not tolerate." Scarano, 203 F.2d at

513 (internal quote and citations omitted).

While Mocco stated in his affidavit that he intended to and was capable of proceeding with the development of the project, he maintained that the City had made it impossible for him to do so in the previous years. (R., Item 7, Ex. A at 8.) Further, he continued to contend that he was unable to perform the project in accordance with the original agreement. (Id.) Thus, Mocco's claims before the bankruptcy court were not inconsistent with this affidavit, and the doctrine of judicial estoppel does not apply.

IV. Collateral Estoppel

The City argues that under the doctrine of issue preclusion, a form of collateral estoppel, Judge Brown's findings in the collateral district court proceedings "conclusively established that Mocco was able to proceed with development of the Project." (City's Br. at 43.) We disagree.

Under the doctrine of issue preclusion, a party cannot relitigate an issue that was already determined adversely to the party in an earlier proceeding. Melikian v. Coradetti, 791 F.2d 274, 277 (3d Cir. 1986). Four factors must exist for the doctrine to be invoked:

> (1) the identical issue was decided in a prior adjudication;
> (2)there was a final judgment on the merits;
> (3)the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and

> (4)the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in the prior matter.

Gruntal & Co., Inc. v. Steinberg, 854 F. Supp. 324, 336 (D.N.J. 1994) (citing Board of Trustees of Trucking Employees of N.J. Welfare Fund, Inc. v. Centra, 983 F.2d 495, 505 (3d Cir. 1992)). The party asserting issue preclusion bears the burden of proving these factors. Id. To carry this burden,

> it is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated.

Clark v. Bear Stearns & Co., 966 F.2d 1318, 1321 (9th Cir. 1992); see also Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir. 1990) ("Reasonable doubts as to what was decided by a prior judgment should be resolved against using it as an estoppel.").

We find that the City has not met its burden of proving that the identical issue was decided in the prior adjudication. First, Judge Brown and the jury in the collateral district court proceeding found that *the breaches* by both parties did not preclude development of the property. (R., Item 7, Exs. B & F.) They made no findings regarding how other matters, including environmental contamination and Mocco's inability to obtain subdivision approval, affected such development. These and other findings were critical to Judge Gindin's determination that

development was not legally permissible, physically possible, financially feasible or profitable.

Second, neither the Judgment of June 24, 1998 in the collateral district court proceedings nor the jury's findings in those proceedings made clear in which years development of the subject property was possible. (Id.) As the City cites no other evidence to support its position, it has not met its burden of demonstrating that the district court already litigated the precise issue of Mocco's ability to develop the subject property during the tax years in question.

Conclusion

We will uphold the Order of the bankruptcy court dated December 19, 2001, reducing the assessed taxes for tax years 1986 and 1988-1996 on debtors' real property. (See n.4 supra regarding tax year 1987.) We find that the bankruptcy court had jurisdiction over this matter pursuant to 11 U.S.C. § 505(a); that the findings of the bankruptcy court were not clearly erroneous; and that the bankruptcy court's determinations were not barred by the doctrines of judicial and collateral estoppel.

IT IS THEREFORE on this day of September, 2002 **ORDERED** that the Order of the United States Bankruptcy Court for the District of New Jersey dated December 19, 2001 be and hereby is **AFFIRMED**; and

IT IS FURTHER ORDERED that the appeal therefrom (no. 1-1 on the docket) be and hereby is **DENIED.**

MARY L. COOPER
United States District Judge